

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

ROBERT W. MUMFORD, JR.,

Debtor.

LISA A. MUMFORD,

Plaintiff,

vs.

ROBERT W. MUMFORD, JR.,

Defendant.

CASE NUMBER 03-46579

ADVERSARY NUMBER 04-4080

MEMORANDUM OPINION RE MOTION FOR RECONSIDERATION

The matter before the Court is the Motion for Reconsideration filed by Defendant Robert W. Mumford, Jr. ("Defendant") regarding the Memorandum Opinion and Order of the Court entered on August 25, 2005 (the "Prior Order"), which granted summary judgment in favor of Plaintiff Lisa A. Mumford ("Plaintiff"). The Motion for Reconsideration urges the Court to reconsider its prior decision on the grounds that although Defendant filed a Motion for Summary Judgment on January 7, 2005 and delivered a copy of that Motion to Plaintiff's counsel, Defendant's Motion for Summary Judgment was never docketed and, thus, not considered by the Court in rendering its decision in

the Prior Order. Plaintiff's counsel has filed an Affidavit averring that he never received a copy of Defendant's Motion for Summary Judgment until August 25, 2005.

This Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1334. This matter constitutes a core proceeding pursuant to 28 U.S.C. § 157. The following constitutes this Court's findings of fact and conclusions of law as required by FED. R. BANKR. P. 7052.

For the reasons set forth below, the Motion for Reconsideration is denied.

#### **FACTS**

The facts of this case are set forth in the Court's Prior Order and, as a consequence, will not be repeated herein.

#### **BASIS FOR THE REQUESTED RELIEF**

Defendant urges this Court to reconsider its Prior Order on the grounds that he filed a Motion for Summary Judgment on January 7, 2005 that was never docketed. As a consequence, he states that this Court should reconsider the Prior Order and "consider the Defendant's motion as if it had been filed properly." (See Motion for Reconsideration at 1.)

Although Defendant states that he filed the Motion for Summary Judgment, it is clear that because such motion was never docketed that it was not, in fact, filed. Defendant's counsel has a password to file electronically through the EM/ECF system and, indeed, is required to file all pleadings electronically.

See Second Amended General Order No. 03-1 dated January 28, 2005, which amended General Order 03-1 that set January 1, 2004 as the date after which all pleadings and other papers in all cases in the United States Bankruptcy Court for the Northern District of Ohio were required to be filed electronically (with certain exceptions not relevant here). Defendant's counsel apparently failed to make the proper entries to file Defendant's Motion for Summary Judgment. A review of the docket would have revealed this failure, which then could have been corrected in a timely fashion. Instead, Defendant's purportedly filed Motion for Summary Judgment was not brought to the Court's attention until August 25, 2005 - approximately seven and one half months after the dispositive motion deadline of January 3, 2005. Defendant is responsible to make sure that his pleadings are properly filed with this Court.

**BASIS FOR DENIAL OF MOTION FOR RECONSIDERATION**

Since it was not timely or properly filed, this Court has no obligation to "consider the Defendant's motion as if it had been filed properly." Furthermore, despite the representation in the Motion for Reconsideration that Defendant's Motion for Summary Judgment "was delivered to the Plaintiff's Attorney by regular mail," Plaintiff's counsel denies receiving the motion via elec-tronic mail, regular U.S. mail or otherwise until August 25, 2005. (Affidavit of Andrew W. Suhar, Esq., ¶¶ 3 and 4.) Nevertheless, this Court will consider

Defendant's Motion for Summary Judgment, and, having done so, finds that there is nothing in Defendant's Motion for Summary Judgment that warrants a change to, amendment of, or vacation of the Court's Prior Order.

Filing a cross motion for summary judgment does not, of itself, require the Court to deny summary judgment for the opposing party. The Court's Prior Order stated at pages 2 and 8 that Defendant failed to file a response to Plaintiff's Motion for Summary Judgment. Defendant's Motion for Summary Judgment doesn't constitute a response to Plaintiff's Motion, but rather requests affirmative relief for himself. Despite this fact, this Court will deem Defendant's Motion for Summary Judgment as a response to Plaintiff's Motion for Summary Judgment. Even considering Defendant's Motion for Summary Judgment as a proper and timely filed response to Plaintiff's Motion for Summary Judgment (which it was not), this Court reaches the same decision set forth in the Prior Order.

Attached to Defendant's Motion for Summary Judgment was a Memorandum in Support that was less than four pages long. The Memorandum stated that Defendant was entitled to summary judgment in his favor because Plaintiff had failed to establish any evidence to support a finding that the debt in question was not dischargeable on the basis of fraud. Defendant stated that Plaintiff failed to present any evidence of fraudulent intent on

the part of Defendant. Defendant also argues that, since Defendant received and cashed the Refund Checks prior to the hearing in the Domestic Relations Court on October 16, 2003, he made no representation upon which Plaintiff could rely. Defendant ignores, however, the written representation that he made in the couple's separation agreement that he would pay Plaintiff her half of the Refund Checks. Almost immediately after the divorce decree was entered, Defendant filed for Chapter 7 bankruptcy protection, seeking to discharge this very debt. The immediacy of the bankruptcy filing after agreeing to make this payment to Plaintiff is, at least, circumstantial evidence of a fraudulent intent when he entered into the separation agreement. Based upon Plaintiff's Motion for Summary Judgment and supporting brief, this Court found and held in the Prior Order,

Plaintiff has established the elements of 11 U.S.C. § 523(a)(2). The uncontroverted facts demonstrate that: (1) Defendant made false representations by cashing the Refund Checks and agreeing to pay Plaintiff her half share; (2) Defendant knew these representations were false at the time he made them; (3) Defendant made the representations with the intent to deceive Plaintiff and deprive her of her share of the Refund Checks; (4) Plaintiff justifiably relied on Defendant's representation to pay her; and (5) Plaintiff has suffered loss as a proximate result of Defendant's misrepresentation.

(Prior Order at 7.)

Defendant alleges that "Plaintiff has presented not one

scintilla of evidence that the defendant made any representations to her," but this argument is belied by the evidence.

In addition, Defendant makes no argument at all in opposition to the Court's second basis for granting summary judgment in Plaintiff's favor, which was that the debt was not dischargeable pursuant to 11 U.S.C. § 523(a)(15). Section 523(a)(15) of the Bankruptcy Code states:

A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt --

(15) not of the kind described in para-graph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agree-ment, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless --

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental conse-quences to a spouse, former spouse, or child of the debtor[.]

Here, Defendant didn't even address the issue of whether the debt

was dischargeable under 11 U.S.C. § 523(a)(15).

### **CONCLUSION**

The Court's Prior Order held that the monthly child support payments and medical expenses were not dischargeable pursuant to 11 U.S.C. § 523(a)(5). This issue has not been addressed by the Motion for Reconsideration and is left undisturbed. The Prior Order held that the debt relating to half of the Refund Checks was not dischargeable pursuant to 11 U.S.C. § 523(a)(2) and (15). This Court found and held that the debt for half of the Refund Checks was not dischargeable based on both subsections of the Bankruptcy Code. Defendant does not argue that Plaintiff is not entitled to summary judgment on the basis of 11 U.S.C. § 523(a)(15). Accordingly, this portion of the Prior Order remains undisturbed. The Motion for Reconsideration only attempts to address the findings and holdings related to 11 U.S.C. § 523(a)(2). Defendant's Motion for Summary Judgment, even if taken as a timely response to Plaintiff's Motion for Summary Judgment, does nothing to defeat Plaintiff's entitlement to summary judgment. As a consequence, the finding and holding that the debt related to half of the Refund Checks is not dischargeable pursuant to 11 U.S.C. § 523(a)(2) also remains undisturbed. After reconsideration, this Court declines to alter, change, amend or vacate its Prior Order.

An appropriate Order will follow.

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HONORABLE KAY WOODS  
UNITED STATES BANKRUPTCY JUDGE



UNITED STATES BANKRUPTCY COURT  
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ORDER RE MOTION FOR RECONSIDERATION

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For the reasons set forth in this Court's Memorandum Opinion entered this date, Defendant's Motion for Reconsideration is denied. This Court declines to alter, change, amend or vacate its Prior Order.

IT IS SO ORDERED.

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HONORABLE KAY WOODS  
UNITED STATES BANKRUPTCY JUDGE